Supreme Court of the U. S.

No. 231.

SAMUEL G. REED, APPELLANT,

vs.

THE MERCHANTS' MUTUAL INSURANCE COMPANY OF BALTIMORE, APPELLEE.

APPELLEE'S BRIEF AND POINTS.

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For Appellee.

Murphy & Co., Printers & Stationers, 182 Baltimore street, Baltimore.

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APPELLEE'S BRIEF AND POINTS.

This is a Libel in Admiralty, by the appellant against the appellee, upon a Policy of Insurance issued by the latter. The policy insured Samuel G. Reed & Co. $5,000, against perils of the seas, upon the ship Minnehaha, "lost or not lost, at and from Honolulu, via Baker's Island, to a port of discharge in the United States not east of Boston, with liberty to use Hampton Roads for orders. The risk to be suspended while vessel is at Baker's Island loading." (p. 17.) "And in case of loss, such loss to be paid in thirty days after proof of loss, proof of interest and adjustment exhibited to the assurers." (p. 18.) The libel alleged that on or about the 1st of November, 1867, Samuel G. Reed was the owner of the ship Minnehaha, then lying at Honolulu, Sandwich Islands; that on or about the 7th of that month she sailed from that port via Baker's Island, with the intention

of there taking in a cargo of Guano, to a port of discharge in the United States. That on the 14th January, 1868, the libellant, being still, as was understood and believed, owner of said ship, procured said policy of insurance, in consideration of a premium therefor, then by him paid to the appellee. That said ship sailed in ballast from Honolulu on or about the 7th November, 1867, on the voyage insured, and arrived at Baker's Island on the afternoon of the 20th November, 1867; that she came to her moorings at said Island in safety, shortly after which a heavy gale with a heavy surf arose; that said gale continued with occasional intermissions, during which time the surf continued with unabated violence, until the 3d December, 1867, when the said ship parted her moorings, and was by the perils of the sea, totally wrecked and lost. That at no time after the arrival of said ship at Baker's Island was it possible to discharge ballast, or to receive cargo, or to commence the process of loading, or even the preparations for loading; that no single act in reference thereto was or could have been judiciously done before the vessel's loss as aforesaid; that the violence of the winds and waves and their adverse course and direction prevented the ship from slipping her cables and getting to sea, or otherwise escaping the perils that surrounded her. That on or about the 9th March, 1868, the libellant having received a full and particular account of the wreck and loss aforesaid, gave to the appellee notice of an abandonment of said vessel, or of the libellant's interest therein to the said Company, and presented partial proofs of loss; but the said abandonment was rejected by the appellee, together with any further proof of loss. Whereupon the libellant, desiring to avoid vexatious and expensive litigations, and to have the liability of the underwriters under the terms of their respective policies, which were similar, determined at as early a day as possible, instituted two representative suits, one against a company in Baltimore, and one against the Insurance Company of the State of Pennsylvania, and prose-

cuted said suits with diligence, believing that a determination by the Court of the questions in dispute would satisfy any fair minded underwriter, and thus dispense with needless litigation in the other cases. That both of said suits terminated in favor of the libellant, one by compromise, and the other by a verdict of the jury and judgment of the Court for the full amount under the policy sued upon, rendered on 23d May, 1872, of all which the appellee had been informed, and that due demand had been made on it by the libellant for the amount claimed in this action, at and before the bringing of this suit. That on the 28th September, 1871, the libellant duly presented and exhibited to the appellee due proof of loss and proof of interest and adjustment under the policy sued on in this case, and demanded payment therefor. That he was and has always been interested to an extent greater than $5,000 in the subject insured, that more than thirty days have elapsed since said proofs were presented, and that no part of the sum insured by said policy has been paid. (pp. 1, 2 and 3.)

The answer alleges that the appellee does not know whether the libellant was or was not the owner of the Minnehaha, on or about the 7th November, 1867, whether she sailed on the voyage and for the purpose in the libel alleged, or whether the libellant was or was not the owner, as was understood and believed, of said ship. It denies that a premium was paid to it for a policy of insurance, but admits that for a premium to be paid by Samuel G. Reed & Co., it issued the alleged policy. But it alleges that it was induced to execute said policy by misrepresentations of facts made at the time of applying for said policy, by brokers, who in applying therefor and in making such misrepresentations, were, and acted as, the agents of the person or persons for whose benefit said insurance was made, and in whose behalf said application was made. That the respondent does not know whether said ship was lost in the manner and at the time alleged or not. But it alleges that even if the allega-

tions of the libel in reference to her loss be true, she was lost while the risk under the policy was suspended, and the respondent is not liable therefor. That the respondent does not know whether it is or is not true that at no time after the arrival of said ship at Baker's Island was it possible to discharge ballast or to receive cargo; but it denies that it was impossible to commence the process of loading; on the contrary, it alleges that if the allegations in the fourth article of the libel be true, said ship was, in the meaning of said policy, "at Baker's Island loading" as soon as she came to her moorings at that Island for that purpose. It admits that on or about the 9th March, 1868, the libellant presented to it a copy of the protest of the master of said ship and other parties, as the preliminary proof required by said policy, and offered to abandon said ship to the underwriters. And it alleges that said papers satisfying the respondent that said alleged loss had occurred, if at all, while the risk under said policy was suspended, the respondent announced that conclusion to the libellant and returned to him said papers the day after the delivery of them as aforesaid to the respondent. That the respondent knows nothing about the suits alleged to have been brought against other underwriters, and says that the allegations of the libel in reference thereto are irrelevant to any question at issue between the libellant and this respondent, and are made for no other purpose than to account for the inexcusable delay in the institution of these proceedings. It further alleges that on the return of said preliminary proof, the respondent supposed that the idea, if any had ever seriously existed, of making any claim upon the respondent for any part of said alleged loss had been abandoned by the libellant, until the 28th September, 1871, when the libellant presented other papers as further preliminary proof under said policy. That the respondent had never objected to the preliminary proof which had been previously presented, and that the presentation of such additional papers was but a pretext on the part of the libellant to

affix another period for his right of action in a Court of the State of Maryland, and thus to postpone the running of limitations, which had already become a bar to the maintenance of said action therein; that, in the prosecution of that purpose, the libellant, on the 20th day of November, 1871, instituted suit against the respondent to recover for said alleged loss, in the Superior Court of Baltimore City, a Court of the State of Maryland, of competent jurisdiction to determine upon the validity of said demand, and to enforce the same, if it rightfully existed. That said contract of insurance was made in the State of Maryland, and there was, at the time of making the same, and still is, a statute of said State in force prohibiting the institution of proceedings on such contracts after the expiration of three years from the accrual of the right of action thereon; that said suit having been instituted after the expiration of said prescribed period of limitations, the respondent pleaded and relied on said defence, among others, and the libellant, for the purpose of evading said defence, on the 30th of May, 1872, discontinued said suit, and on the same day instituted these proceedings. That although the technical plea of limitations is not always and necessarily a bar to the maintenance of a suit in Admiralty, District Courts in the exercise of Admiralty jurisdiction, do not entertain stale demands. That the District Court, in determining whether or not a demand like this, over which it has jurisdiction concurrently with the common law Courts of the State in which it sits, will, by analogy, adopt the period of limitations prescribed by law for the maintenance thereof in such State Court, and especially that it will not lend its process, as it is here invoked, expressly for the purpose of evading a defence which is conclusive in the Court which first had jurisdiction over the demand attempted to be enforced. (pp. 4, 5 and 6.) The District Court, after full hearing and consideration of all the proceedings and evidence, passed a decree, dismissing the libel, with costs. On appeal to the Circuit Court, the decree of

the District Court was affirmed, and this appeal was then taken. (p. 8, 80 and 81.)

The application on which the policy was issued was made by Johnson & Higgins for an insurance "at and from Honolulu, via Baker's Island, to a port of discharge in the United States, not east of Boston, with liberty to use Hampton Roads for orders; the risk to be suspended while vessel is at Baker's Island loading." (Ex. B, p. 35.) It was inclosed in a letter saying "our companies here are averse to Baker's Island risks, and for that reason the owners suspend the risk while at Baker's Island loading.

The Atlantic have taken a large line on vessel and freight @ 7 per cent. with scrip." (Ex. C, p. 36.)

That letter, whether intended to mislead the appellee or not, was naturally interpreted by its President to mean that the New York companies, which were averse to Baker's Island risks, had excluded them by suspensions precisely similar or equivalent to that contained in this application. The letter could not have more pointedly stated that fact, in reference to the Atlantic, at all events, without saying so in express language. That Company being the largest in New York, its business equal to that of all the other marine companies combined, its officers having large experience and means of information, especially in reference to that particular risk, the Appellee was induced by that letter to follow what its President, Mr. Coale, supposed was its lead, and to write his policy in the language which he supposed the Atlantic and other New York companies had used. (Testimony of George B. Coale, (3d, 4th and 5th ans., pp. 42, 16, 19, 23, 24, 27, 28, cross-int., pp. 46 and 47.)

The two policies of the Atlantic dated 19th of December, 1867, one upon the vessel, the other upon the freight, instead of employing the language which Mr. Coale had been induced by that letter to suppose they had used for the purpose of excluding the risks of Baker's Island, had used the following, viz: "It is

understood and agreed that the risk is to be suspended from the date of her arrival, off Baker's Island, and until the vessel shall have sailed, taken her departure, and obtained a good offing from the Island." (pp. 73 and 76.) Unless this exception was intended and understood to mean the same as that contained in the policy of the appellee, the representation upon which the latter was procured was intended to deceive. The appellee is unwilling to impute such intention either to the appellant or to Messrs. Johnson & Higgins, by whom the application was made. All of them seem to have supposed that the exemption contained in the appellee's policy was co-extensive with that in the policies of the Atlantic, and meant it to be so. Mr. Tooker, the clerk of Johnson & Higgins, by whom the letter in their name was written, testifies that he was requested to procure policies from other Companies, to cover the vessel while at Baker's Island, because the policy of the appellee was not supposed to include that risk. He says: "I was requested to ascertain at what rate I could insure the vessel at and from her arrival at Baker's Island, until completion of her loading, and actually made propositions to this effect to some Insurance Companies, but which Companies they were I cannot now remember. I made such application and inquired if they would make such insurance, because I was asked to, and seeing that the policy given by the defendants did not, in my opinion, cover the gap. It was shortly after the policy from the defendant was obtained." (See questions on p. 38, and answers of Tooker, pp. 40 and 41.)

After the loss, the appellant's agents put this same construction on the appellee's policy. "Upon the first knowledge of the loss that reached their New York agent, he, the agent, reported that the Minnehaha was lost, without insurance." (47 cross-int. p. 49.) None of them was ever so unfrank as to pretend that the appellant intended by it to cover the risk at Baker's Island. In the summer of 1868, Mr. Coale, called at Mr. Reed's office in Boston. Reed being sick, Coale asked Tyler, the clerk and confidentia

agent whom he found in the office, "did Mr. Reed intend, when he obtained these policies, to cover that risk at Baker's Island." Tyler, instead of replying in the affirmative, said "he intended to cover the whole voyage entire and complete, failing that, he got as near to it as he could." (14th cross-int., p. 27.) Afterwards, during the trial of the case in the District Court, Coale said to Tyler, as testified to by the latter: "That if I, (Tyler) could assure him, that we believed the insurance made by his company attached at the island, he thought he would be willing to pay it then. Mr. Coale, afterwards in the court room told me that he did not believe we thought the policy attached at any time the vessel laid at the island. I replied, as I had before told him, when he called at Mr. Reed's office in Boston, that we tried to insure the whole risk clear; failing that, we got as near to a clean policy as we could." (20th and 21st ints., pp. 25, 26.) This evidence of what the appellant supposed he had accomplished by the policy of the appellee, and of the construction put on that instrument by his agents, including Mr. Tooker, an expert of large experience in insurance business, is confirmed by the testimony of other experts as to the meaning of the word "loading" used in such a connection as that in which it is found in the Policy under consideration. They all agree that an adjective so used is intended to denote, not the manner in which the crew of the vessel is or is to be engaged, but the purpose for which the vessel is or is to be at the designated place at the time named. They were asked: "Have the words 'at Baker's Island loading' or at any other place "loading" by universal and well established usage and custom, in the business of marine insurance, when applied to a vessel, a particular and definite meaning," and they respectively replied as follows:

George B. Coale, who has been a marine underwriter since 1846, says "They are understood to express the condition of the vessel while in port for the *purpose of loading.* It is a very common thing for vessels to be reported to underwriters, and by underwriters to each other, in making reïnsurances as 'loading,'

when they are in port for that purpose. We don't qualify the phrase, such as waiting cargo—'loading' is the technical word to indicate that she is there for the purpose of taking in, or is actually taking in, cargo." (6th and 7th int., pp. 42, 43.)

William B. Willson, who has been in the business for ten years, and who is the agent of the United States Lloyds, says: "These words are generally put in the application, which is part of the contract, and are used to convey the idea that the vessel is or is to be in port for the purpose of loading, that she is loading, or that she has completed her loading prior to her departure. (3d int., p. 56.)

James Carey Coale, who has been engaged for twenty-two years in the different branches of marine insurance business, and who is the agent of the New York Board of Underwriters, embracing all the marine insurance companies of that city, says: "I use it in my practice as entirely synonymous with the words in port. Sometimes the words in port are used; sometimes loading; generally, the latter. Sometimes loading on a certain date, or loading at last dates, *the idea being to arrive at where the vessel was.*" (Ans. to 3d int., p. 59.)

4th Int. "For what purpose and with what meaning are the words 'loading' or 'discharging' at any named port, or repairing at any named port, used in contracts of insurance, under the custom and usage to which you have referred."

Answer. "Simply to indicate that the vessel was there and had not sailed."

5th Int. "Do these words, or any of them, according to the usage or custom to which you have referred, relate to the mode in which the vessel is being, or is to be actually used, or the purpose for which she is at the designated port, under the usage and custom to which you have referred?"

Answer. "It is uniformly understood that the applicant guarantees that the vessel is then loading or to load, discharging or to discharge, repairing or to repair." (p. 59.)

The admitted facts and proof in the case show that while a vessel was at Baker's Island, *for the purpose of loading* with Guano, she occupied precisely the same position, and was exposed to precisely the same perils, neither greater nor less, whether "loading" or not, and that the *locality* and the perils incident thereto constituted the risk from which it was intended, by the suspension of the policy, to exempt the Company. It was admitted "that there is no harbor or anchorage for ships at Baker's Island; that when ships arrive there they are moored in the open sea, in an exposed and perilous position, by the means hereinafter described, which were and had long been notoriously necessary and in use at the time the insurances in these cases were effected, viz: an anchor weighing 5,600 pounds is fastened to a coral reef, and to it (the anchor) is attached a two inch admiralty-tested bridle-chain 90 feet long, with a heavy swivel-shackle at the other end; to this heavy swivel-shackle is attached another two-inch admiralty-tested pendant chain 630 feet long, with another heavy swivel-shackle at its end. This last heavy swivel-shackle is attached to a floating buoy 12 feet wide by 9 feet high. Two other chains, being 1¾-inch backing-chains, each 1,080 feet long, with a heavy swivel-shackle at the further end of each, are also attached to the first-mentioned heavy swivel-shackle, each of which said backing-chains is fastened to a separate anchor, and these anchors are fastened, some distance apart, to another coral reef nearer to the island than the coral reef first-mentioned. To the aforesaid pendant chain of 630 feet length, another chain is fastened, which holds the ship. In this position and by these means, ships at Baker's Island are moored and remain, *whether actually loading or not*, and their cargo is sent aboard in small boats from the island. Their position and mooring are the same from the time of their arrival in front of the island until they leave. That on the arrival of the Minnehaha at the island she moored in the position and manner above described, with additional moorings, both of

the island and of the ship, and was so moored when, by the violence of the winds and waves, caused by a storm, she separated from her moorings and was lost." (p. 7.)

Capt. Bursby, the master of said vessel at the time of her loss, undertakes to prove that a vessel is disabled to some extent and in a more helpless condition while loading at Baker's Island than when not so engaged and gives the following reasons therefor. "She has to have some of her ballast out to get ready for loading; the vessel will be more or less lightened from her sailing draught; she would have her water casks, surplus dunnage, wood and other movable articles taken up on her deck to make room for the cargo, thereby lumbering up her deck, rendering it inconvenient to get about to handle the ship, than it would be otherwise if it were not there. One or more of the side ports would be out likely, or at least without being caulked tight. All these things would have to be replaced and secured, which would take time to do, to make it safe for the ship to be put under sail. A portion of the crew would be likely to be below, and some on shore working the cargo. This would also take time to bring them and put them in readiness to work the ship." (22 A., p. 12.)

The overwhelming preponderance of testimony, from ship masters of longer and larger experience than Bursby's, is that in the hands of a competent and prudent captain, a vessel at Baker's Island would be exposed to precisely the same peril, whether loading or preparing to load, or waiting for a load. Capt. Sanford, 60 years of age, a marine surveyor for underwriters, a master mariner of the largest and most varied experience, is asked: "Read in the record of this case admissions of the Proctors of the respective parties in reference to vessels going to Baker's Island for guano, examine the diagrams referred to therein as part thereof, and state whether, in your opinion as a skilled mariner, a vessel at said island is in any greater danger when actually engaged in loading than when not so engaged?'

He replies: "I don't consider the vessels in any greater danger. The same danger exists all the time they are there. When a vessel arrives at Baker's Island she moors to the same mooring and in the same way as vessels while loading, and therefore is exposed to the same dangers. There can be no more difficulty in getting a vessel under way when loading, provided that the vessel is kept in a proper condition to go to sea, which can be done by having everything in readiness to slip his moorings and make sail on the vessel. The vessel being in ballast, Baker's Island being a port where it is necessary frequently to put to sea in consequence of the weather, while loading, it would be necessary to trim up that ballast in as small a space as would do no injury to the vessel. All surplus dunnage, wood, water casks or any movable articles which are not intended to remain in the hold, should be taken and stored in the between-decks. The two ends of the ship, forward and aft, being prepared for receiving cargo in this way, there will be nearly one-half of the hold clear for receiving cargo. The cargo should then be taken on board, say for a ship of the size of the Minnehaha, about 200 tons stowed in the ends of the ship, from each end of the ballast, which is in the middle of the ship, to the end of the ship itself. The 200 tons now being on board, I would then take out the ballast at each end of the pile of ballast, working from the guano to the centre of the ballast. When a sufficient amount is out (200 tons,) then fill the space again with guano, and so continue until the whole is out. In that way the ship's trim cannot be affected, and always be kept in a state of readiness to go to sea." (pp. 51, 52.)

Question. "Would a prudent captain, under any circumstances, withdraw from his ship, for the purpose of loading her, any portion of his crew which were necessary for her safety?"

Answer. "No." (9th Int. and Ans., p. 52.)

1st Cross-Int. "How long has it been since you were master of a vessel?"

Answer. "November, 1865."

2d Cross-Int. "Of what vessels did you act as master?"

Answer. "Schooner Equity, in 1835; the Brig Ann, Ship Napier, Ship Alexander, Ship Sirocco, another Ship called the Napier, and also steamers."

3d Cross-Int. "State their respective tonnage?"

Answer. "The least, I presume, was about 120 tons, and the largest 1800."

4th Cross-Int. "Where did you trade?"

Answer. "All around the globe."

6th Cross-Int. "Did you ever trade to any island in the Pacific ocean?"

Answer. "I have been to islands in the Pacific ocean, and taken in cargoes."

7th Cross-Int. "What islands?"

Answer. "Chinchas."

8th Cross-Int. "Then you have taken in guano?"

Answer. "I have."

9th Cross-Int. "On what kind of a vessel?"

Answer. "A three-deck ship."

10th Cross-Int. "Her tonnage?"

Answer. "Between twelve and thirteen hundred tons."

11th Cross-Int. "State what knowledge you have of Baker's Island?"

Answer. "All the knowledge I have is from the agreement and diagram filed in this case, and the testimony of the Captain, together with conversations with other men who have loaded at the Island."

12th Cross-Int. "If you went to Baker's Island with a ship of eighteen hundred tons and upwards in ballast, for the purpose of taking in a cargo of guano, after you had come to your moorings, what would you first do to take on that cargo? In what condition would you post your vessel?"

Answer. "I would first put my ship in a condition to slip her moorings and go to sea; then I would clear my hold for receiving cargo."

13th Cross Int. "Is that all you would do?"

Answer. "Yes."

14th Cross-Int. "Would you not open your ports?"

Answer. "No; not if the ship is rolling heavily and not in that port at all, if the swell is heavy."

15th Cross-Int. "Suppose there was no swell or current?"

Answer. "Then, if the weather appeared settled, and the cargo coming off, I would open my ports to facilitate the work; but when the cargo stopped coming, or there was an appearance of bad weather, I should close my ports and caulk them."

16th Cross-Int. "Do not storms or squalls suddenly arise at Baker's Island?"

Answer. "Not too suddenly. With a person on the watch for a change in the weather, there would be in my opinion always time to secure the ports. I have never been to Baker's Island, but I have been near there and have passed through all that weather."

17th Cross-Int. "If you have never been to Baker's Island, how do you know that it is frequently necessary, then, to put to sea while loading?"

Answer. "I give my opinion from what I have heard of the testimony of the Captain of the Minnehaha in Court, and from having read his testimony, and from other masters of ships, who have loaded at the Island."

18th Cross-Int. "You have said that after coming to your moorings, the first thing you would do, preparatory to loading, if your vessel were in ballast, would be to clear your hold; how would you clear your hold?"

Answer. "I would in the first place trim up my ballast, as near the centre of the ship as possible, but not too much to injure the ship. Then I would remove everything movable from the ballast to each end of the ship, putting it between

decks there to be stowed securely, in case the ship had to put to sea. I mean that the hold in the ends of the ship from the ballast shall be cleaned out, and everything movable stowed in in the between-decks securely, in case the ship had to go to sea."

19th Cross-Int. "If you arrived at Baker's Island in ballast with a vessel of the size of the Minnehaha, where would her ballast be?"

Answer. "In her hold."

20th Cross-Int. "Would it cover that hold?"

Answer. "No."

21st Cross-Int. "What portion of that hold would it cover?"

Answer. "It need not cover over one-half of the length of the hold. I would keep it in about that space."

22d Cross-Int. "What else would you have in that hold?"

Answer. "If I had commanded the Minnehaha, nothing else should have been there, knowing the port to be so dangerous and necessary to get away from as quickly as possible."

23d Cross-Int. "Where would be your dunnage?"

Answer. "On the lower deck until it was needed."

24th Cross-Int. "If you had nothing else in your hold but the ballast you have mentioned, and had it in the position you have mentioned, would you have had your vessel perfectly trimmed?"

Answer. "Yes; I would have trimmed her by placing part of my dunnage aft, and part forward, and when using the dunnage take from each end, keeping the ship always in trim."

25th Cross-Int. "If you would have had only the ballast you have mentioned in the hold, what do you mean by saying that after having put the ballast up in the centre of the hold of the ship, you would also have taken movables from the ballast, and put them between the decks, preparatory to your loading?"

Answer. "My meaning is, that all the movables, from the edge of the ballast to the end of the ship, I would put on the lower deck."

26th Cross-Int. "But if you would have had nothing else in your hold but ballast, how would you get the movables there?"

Answer. "I would not have had anything except the ballast in the hold, but if anything else than ballast had been there, I would have removed it as I have described."

27th Cross-Int. "If, as you have stated, you would have had the ballast (had you commanded the Minnehaha) in the hold of the vessel, and the dunnage on the lower deck, and would thus have considered the vessel perfectly trimmed and would have placed that ballast towards the centre of the hold of the ship, and have also the dunnage placed at the ends of the ship, preparatory to loading, would you then consider your vessel also trimmed?"

Answer. "I would. I trimmed her by putting it there."

28th Cross-Int. "If it were necessary for you, preparatory to loading, to thus place your ballast in the centre of the hold, and thus put your dunnage at each end, on the lower deck, and would consider your vessel equally well trimmed as when your ballast covered half the length of the hold, as you have said you would have done had you been in command of the Minnehaha, and had your dunnage on the lower deck, why would you not have your vessel, whilst coming to Baker's Island, in the first condition, and be at once thus prepared to load."

Answer. "That is what I would have done."

29th Cross-Int. "Then you would have had your vessel in the same condition whilst at sea as you would have had it in when loading?"

Answer. "Yes, when I arrived. Previous to my arrival I would have put the vessel in that condition. I would have prepared the vessel in that way for loading."

30th Cross-Int. "Then I understand you as saying that a vessel is in the same condition, or can be safely in the same condition, at sea as when loading?"

Answer. "Yes; that vessel was just as safe."

31st Cross-Int. "Then I understand you as saying that at an open island on the Pacific Ocean a vessel is in no more helpless a condition whilst loading than when not loading?"

Answer. "She is in no more danger when loading than when not loading. The danger is always the same." (See pp. 52, 53, 54 and 55.)

Capt. Johnson, a marine surveyor, who had been a ship master for 15 years, and who, in that capacity, has had large experience in loading guano at the Pacific Islands, testifies to the same effect. He says, "I don't think she is in any more danger while loading than while she is waiting to load. I should suppose a man would be always prepared to slip his moorings while lying in an open roadstead like Baker's Island. There is nothing to prevent him from being ready that I know of.

6th Int. "Is it necessary or customary, or would it be proper, if a vessel is at an island such as Baker's Island is described in the agreement before mentioned to be, and is ballasted with stone and sand, to throw out all of her ballast before beginning to load?"

Answer. "No seaman would do it who knows his business. I should keep my ballast in the centre of the ship, and take cargo, such as he was going to load with, as I required it, in both ends of the ship, and after I got a hundred or a hundred and fifty tons in, I should then discharge my ballast gradually, supplying its place with cargo, until I made my ship perfectly safe with cargo before discharging the whole of the ballast."

2d Cross-Int. "What was the tonnage of the ships you commanded as master?"

Answer. "One 600 tons, one 1,000 tons, one 1,400 tons, one 1,500 tons, one 2,000."

3d Cross-Int. "Have you ever been at any of the Pacific Islands, except the Chinchas, as master, with your vessel? And if so, state what Islands?"

Answer. "I have never moored at any of them except at the Chinchas."

4th Cross-Int. "Are the Chinchas dangerous Islands?"

Answer. "They are not considered very safe. We are always prepared to unmoor, if necessary."

17th Cross-Int. "Suppose you were going to that Island (Baker's Island) for guano from Honolulu in ballast, with a ship of 2,000 tons, how would you have your ship ballasted?"

Answer. "I should have it occupy about half the space of the ship, and as near from the centre towards each end as she would require it, reserving a place in the ends, if possible, (and it would be possible in a ship of that size) for guano."

18th Cross-Int. "Where would you have your dunnage and water casks?"

Answer. "On the lower deck."

19th Cross-Int. "What amount of ballast would you have?"

Answer. "In the Minnehaha, I should have 400 or 500 tons, as near as I recollect this vessel, 450 tons, I should say. I saw her in China."

20th Cross-Int. "If in charge of the Minnehaha, the vessel of which you have just spoken, and having her ballasted as you have just stated, and being with her at the moorings at Baker's Island, what would be the first thing that you would do preparatory to loading with guano?"

Answer. "I would first take in guano in the forward and after-hold of the vessel, say fifty tons at each hatch, then I would take out fifty tons of ballast, from the after or forward end of my ballast supplying its place with guano; I would proceed in that way till I thought my vessel perfectly safe, then if the ballast was not all out, I would discharge the whole of it."

24th Cross-Int. "Would not a portion of your crew be liable to be on shore while loading the vessel?"

Answer. "A prudent man would not send but a small number, at any time, while lying at the Island. It is customary to have

extra men belonging to the ship while at the Island. I cannot say anything about Baker's Island, I speak of the Chincha." (pp. 68, 69, 70, 71.)

On March 9th, 1868, after the loss of the ship, and the return of Capt. Bursby to the United States, the appellant notified the appellee of the loss, abandoned her to the Company and claimed for a total loss. (Ex. No. 1, p. 29.) The appellee next day returned the preliminary proof of loss, and replied, declining to accept the abandonment, denying all responsibility for the loss. (See Exhibits No. 2, p. 50; No. 4, p. 62, and notice to produce the the originals p. 43.) Nothing further was done in reference to the claim under any of the policies on the Minnehaha or her freight until Tyler was sent by the appellant from Boston to New York for the purpose of procuring attachments against any of the companies which might have funds in that City, and some of the suits now called "representative suits" were then instituted (p. 28.) Mr. Booth, the present counsel for the appellant, who then represented some of the underwriters, wrote to the appellee on 3d of August, 1871, proposing that all of them should agree to be bound by the result of these suits. The appellee instantly replied that it had already declined to accept any claim made by the appellant under its policy. (See Exhibits Nos. 5 and 6, p. 63.) It is difficult to understand how, after this correspondence, the appellant could have supposed, as alleged in the Libel, that the appellee would consider itself bound by the result of these suits, or that it intended to do anything else than contest a claim against it, if one should ever be made.

No objection was made to the preliminary proof offered in 1868. The appellee then denied altogether its liability under the policy. This was a waiver of the right to object to the want or sufficiency of it, and gave the appellant an immediate right of action for the assertion of such claim as it had. Limitations ran from that time. The appellant, after his claim was barred by limitations, for the sole purpose of endeavoring to remove

that bar, under the pretext that additional proof was necessary, called on the appellee in the fall of 1871, and went through the form of offering additional proof, which might as easily have been furnished three years before. The appellee refused to receive it, saying that the right of action had accrued more than three years before and was then barred by limitations. (See Coale's testimony, pp. 43, 44, and Exhibit C, p. 28.) On the 20th of November, 1871, suit was instituted in the Superior Court of Baltimore City. The appellee pleaded limitations. The appellant, recognizing that as a fatal defence in that Court, and hoping to evade it in Admiralty, dismissed that suit on the 30th of May, 1872, and on the same day instituted these proceedings.

See Admissions, pp. 6 and 7.

POINTS.

The appellee will contend that

1st. The letter of Johnson & Higgins to Coale, enclosing the application for insurance, was intended to produce and did produce on the mind of the latter the impression that the Atlantic and other New York Companies had excluded the risks of Baker's Island by suspensions coëxtensive with that mentioned in the application,—that they had accomplished that object solely by suspending the risk "while at Baker's Island loading." If that was not true, if the suspension in the policies of the Atlantic was not identical in effect with that in the appellee's policy, if the proper construction of the latter would not give to it that effect, it was obtained by misrepresentation and is null and void.

1 Parsons on Marine Insurance, 409, 410.

2d. The ~~insurance was not intended to~~ cover the vessel *at* Baker's Island, but only during her voyage *via* that island. When property is intended to be covered by a marine insurance *at* a place, not constituting part of a voyage, *express lan-*

guage is always used appropriate and adequate for that purpose, as for example, "*at* and from," "to, *at* and from." "to, *while there* and thence," "with liberty to *touch at*," "with liberty *to touch and stop at*," "with liberty to touch and load at," &c.

1 Philips on Insurance, sects. 928, 1005 and 1014.
2 Parsons on Marine Insurance, ~~sects. 285-6 and notes,~~ p. 16 and notes.
Park on Insurance, 388.
Barber vs. Fleming, 5 Q. B. Law Rep., 59.
Stitts vs. Wardell, 2 Esp., 610.
Sheriff vs. Potts, 5 Esp. 96.
U. S. vs. The Paul Shearman, 1 Peters, C. C. R., 98-104.
Cross vs. Shuttliffe, 2 Bay, (S. C.) 220.

3d. The words "*via* Baker's Island" were descriptive of the voyage by which the vessel was not only at liberty, but required to come from Honolulu to the United States. Without them she would have been obliged to pursue the usual route: passing that Island, if unusual and unnecessary—a *fortiori*—stopping, *loading* or even *touching* there would have been a deviation, and have caused a forfeiture of the policy. No words in the policy expressly gave permission to *stop*, still less to *load* at the Island. If the words suspending the risk, while "at Baker's Island loading" had not been used, no one would have imagined she was at liberty to stop there. They were introduced for the purpose of *suspending* and not of *continuing*, of *limiting* and not *enlarging* the operation of the policy.

If the intention had been to suspend the risk "while loading," the collocation of words would have been "while loading at Baker's Island,"—not "while at Baker's Island loading." Place is the idea or purpose of the words as used. "Loading" is subordinate, and indicates the purpose of being at the place,—not the terms of the risk. A different collocation might have invited a different interpretation.

In an analogous case of insurance on freight, where the risk was to attach "from the loading," it was held to attach because the cargo was ready, although the ship was lost while in dock, getting ready for repairs.

Devoux vs. J'Anson, 5 Bing., N. C., 539.

4th. If the construction here contended for would not be the natural and proper one, looking at the policy alone, it is proper to invoke, in aid of its interpretation, the letter enclosing and therefore a part of the application. The purpose for which the suspension was suggested was to avoid "Baker's Island risks," all of the risks incident to that locality. To accomplish that purpose the words of exemption were suggested—to accomplish it they were employed. Looking at the entire policy, the object sought to be accomplished, and all of the circumstances of the case, it seems impossible to resist the conclusion that the words in the suspension clause were employed to describe the *place* at which the risk was to be suspended, and the *purpose* for which the vessel was to be there, without reference to the mode in which her crew might be employed. Courts have gone so far in this line of interpretation as to decide, that although the literal and grammatical construction of a policy would make it attach only on goods "at" a designated place, "it may attach although the ship be at another place, if the policy and all the circumstances make it certain that the name of the place is either surplusage or a mere term of description."

2 Parsons on Marine Insurance, p. 4[illegible]

If the name of a place can be so rejected, for the purpose of carrying into effect the intention of the parties, why may not an adjective, designating only the contemplated employment of the crew at a place be rejected, on the same principle?

Parsons, in discussing the effect of the word "loading," in a policy on goods, "beginning the adventure from the loading of

goods," says, "If similar words are used, they are *prima facie* subject to this construction, as the grammatical construction." That is, that the policy does not ordinarily attach until the goods are actually loaded. "There are however many cases in which it is obvious that they are not used, either in this sense, or for this purpose, but only as words of description, which are to be considered, construed and applied in connection with the whole policy and all the circumstances of the case. If these make it apparent that it was not the intention of the parties to make the attachment of the policy dependent upon the fact of loading, it would be a departure, not only from natural justice, but from the true and rational principle of commercial law to give these words this construction and effect."

2 Parsons on Marine Insurance, 50.

5th. Policies of insurance are rarely prepared by men accustomed to the use of accurate language. More liberal rules of interpretation are applied to them than to any other instruments known to the law. Parsons, in speaking of them, says, "Exceptions are often made—as they always may be—to suit the peculiar circumstances of the case; and no other rule can be given than that such exceptions must always be construed according to the actual intention of the parties, so as to carry into effect, rather than to defeat it."

1 Parsons on Marine Insurance, p. 623.

"In the construction of polices the true intent and meaning of the parties are to be regarded more than the strict and literal sense of the words."

Cross vs. Shuttliffe, 2 Bay, (S. C.) 23.

This Court has said in reference to them, "Policies of insurance are generally the most informal instruments which are brought into Courts of Justice, and there are no instruments

which are more liberally construed in order to effect the real intention of the parties, if that can be ascertained."

Yeaton vs. Fry, 5 Cranch, (S. C. of U. S.) 335, 342.

1 Parsons on Marine Insurance, p. 64, note 1.

In the case in which this language was used the risks excepted were of "blockaded ports." The vessel went to a port which was "blockaded" in point of fact, but the blockade was not known to her captain until he was warned off. The Court, speaking of the exclusion of such ports from the risk, says, "It is their character as blockaded ports which excludes them from the insurance. The risk of a blockaded port, as a blockaded port, is the risk incurred by breaking the blockade." Sailing for such a port without knowledge that it was blockaded does not expose the vessel to such risk. Therefore, although the vessel in question was within the language of the exception, she was held not to have been within in its spirit, and the exception was held not to have become operative.

E converso, the exception becomes operative, the risk is suspended, if the facts be within the spirit of the exception, though not within its language. The underwriter is entitled to the same rule of interpretation in his favor as is applied against him.

Even in reference to bonds, to the interpretation of which mere rigid and technical rules are applied, this Court, speaking through Chief Justice Marshal, has said, "There are many cases on the construction of bonds, where the letter of the condition has been departed from to carry into effect the intention of the parties."

Cooke vs. Graham's Adm., 3 Cranch, 235.

6th. It is clear from the admissions of counsel and the proof in the case, that the danger at Baker's Island was precisely the same while the vessel was loading as when not so employed. The dangers were those incident to the locality only. The

vessel was to occupy precisely the same position from the time of her arrival at the Island until her departure therefrom, whether loading or not. There was therefore no reason why the risk should be suspended while she was loading, and the policy be left operative when she was not loading but exposed to the same risk. "When a circumstance in the description of a risk insured is wholly immaterial, the failure of it never operates to defeat the contract."

Manly vs. U. S. F. & I. Ins. Co., 9 Mass., 82–86.

The charter party under which she went to that Island stipulated "and the said vessel shall remain at said Baker's Island ten days before having the right to commence to load guano, if required so to remain by the agent of the American Guano Company." (p. 20 of Record.) If the construction contended for by the appellant be correct, she might, at the option of the Guano Company, be kept at her moorings, subject to all the risks of that locality, and the policy be still operative, although these were the very risks to which the letter of Johnson & Higgins said the New York companies were averse—although the language employed in the suspension clause was that suggested by him and adopted by the appellee for the purpose of avoiding them. Her cargo was to be sent out in lighters—when the weather was such as to put the ship in danger, the loading was necessarily suspended. (See Bursby's testimony, p. 15, 27 Cross Interrogatory.)

If the appellant's construction be correct, whenever the danger arose, the policy was to be operative. A clause inserted for the purpose of excluding a contemplated danger was to become inoperative whenever that danger existed. At night, when the danger was greater than in the day, the loading would be suspended, and the risk would re-attach. While her crew or the Kanakas were at their meals, the same results would ensue.

7th. It is clear that neither Johnson & Higgins, who obtained the policy, nor the appellant, who was to be protected by it,

considered the vessel covered by it at any time while she was at the Island, whether engaged in loading or not. Johnson & Higgins, by the direction of the appellant, sought in vain, to obtain other policies, to cover this unprotected gap. This construction put by them upon the instrument is entitled to great and conclusive weight if the interpretation of it would otherwise be doubtful.

Railroad Company vs. Trimble, 10 Wallace 367, 377.

8th. The testimony of experts is proper to be resorted to, as an aid in interpreting the clause of exemption.

1 Parsons on Marine Insurance, p. 77, note 1, 627-8, p. 127, p. 83, note 2, (84, note 3, Dictionary no authority.)

Salmon Fall's Man. Co. vs. Goddard, 14 Howard. 447.

2 Taylor's Evidence, pp. 1009, 1010, secs. 1060-62-68.

1 Greenl. Ev. secs. 280-282.

Grey vs. Harper, 1 Story, 574, 588.

Shaw vs. Wilson, 9 Cl. and Fin., 555.

Smith vs. Wilson, 3 Barn. and Ad., 728 (one thousand proved to mean twelve hundred.)

Williams vs. Wood, 16 Md., 251.

Merchants Bank v. State Bank, 10 Wall. 667

9th. The right of action accrued 11th of March, 1868, when Coale denied all responsibility under the policy. (Record p. 50.)

Suit might then have been immediately instituted, without even waiting for the expiration of the thirty days provided for in the policy.

Balto. Fire Ins. Co. vs Loney, 20 Md. 20.

10th. It was barred by limitations when this suit was brought.

"All actions of account, actions of assumpsit or on the case, actions of debt on simple contract or for rent in arrear, detinue and replevin, all actions for trespass for injuries to real or personal property, shall be commenced or sued within three years from the time the cause of action accrues."

1st Md. Code, p. 395.

11th. In cases of concurrent jurisdiction, Courts of Equity adopt and are governed by the period of limitations prescribed for Courts of law.

Bank of U. S. vs. Daniel, 12 Peters, 56.
Lewis vs. Marshall, 5 Peters, 470–77.
Peyton vs. Smith, 5 Peters, 485–94.
Elmendorff vs. Taylor, 10 Wheat., 152–68.
Thomas vs. Harvies' heirs, Ibid. 149, 150.
Miller vs. McIntyre, 6 Peters, 61–5–6–7.
Burke vs. Smith, 16 Wal. 401.
Knight vs. Brown, 14 Md., 7.
Teackle vs. Gibson, 8 Md., 87.
Hirtle vs. Schwartz, 3 Md., 383.
Dugan vs. Gittings, 3 Gill, 161.

12th. Admiralty Courts are Chancery Courts of the sea, and governed by Chancery rules in the administration of their remedies.

Packard vs. Sloop Louisa, 2 Wood. and Min., 60.
Pittman vs. Hooper, 3 Sumn., 305.
Brig Sarah Ann, 2 Sum., 212.
Willard vs. Dorr, 3 Mason, 163–4.
Joy vs. Allen, 2 Wood. and Min., 304, 323–4–5.

13th. The case of the Key City, 14 Wal., 653, was a proceeding *in rem*, a case exclusively of Admiralty jurisdiction. The Court expressly confines the principles there enunciated to such a case only. It establishes no principle at variance with that here contended for. Courts of Equity do not inflexibly adopt the common law periods of limitations, in reference to matters over which they have *exclusive* jurisdiction.

Wisner vs. Barnet, 4 Wash. C. C., 640.
Kane vs. Bloodgood, 7 John C. C., 90, 112, 113, &c.
Admiralty Courts make the same distinction.

14th. The suit in the Superior Court of Baltimore City was dismissed because this defence was found to be insuperable. This proceeding was resorted to in the hope of evading it. Parties are not permitted thus to vary their rights by their mode of seeking redress.

Burke vs. Smith, 16 Wal., 401.

This Court will not permit the appellant thus to abuse the Admiralty jurisdiction.

15th. The appellant had no right to suppose that the appellee would consent to be affected by the result of his suits against other parties. The present counsel of the appellant could not have thought so. The secretary of the appellee expressly told him that it would not. (p. 63.) The pendency of these suits, therefore, and the result of them, can have no influence, in any point of view, on this case.

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For Appellee.